

Served: June 4, 1992

NTSB Order No. EA-3570

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of May, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

127-EAJA-SE-12007

TED RAY MOORE,

Applicant.

ORDER DISMISSING APPEAL

The applicant has moved to dismiss the notice of appeal in this proceeding because it was not, as required by Section 821.47 of the Board's Rules of Practice (49 CFR Part 821),¹ filed by the Administrator within 10 days after the law judge, on January 21, 1992, issued a decision granting in part and denying in part the applicant's request for an award of fees and expenses under the Equal Access to Justice Act. We will grant the motion.

In reply to the motion to dismiss, the Administrator does not dispute that he did not file a timely notice of appeal. Rather, he maintains that no such notice was required under Part 826 because his appeal brief was filed before the judge's

¹Section 821.47 provides as follows:

"§821.47 Notice of Appeal.

A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to §821.8) a notice of appeal within 10 days after an oral initial decision or an order has been served."

decision became final; that is, it was filed within 30 days after service of the decision. See Section 826.38.² We find no merit in the Administrator's position. An initial decision can become final under Part 826 only if no appeal to the full Board is taken, or the Board does not sua sponte take review, within the time limits set forth in Part 821 of the Board's Rules of Practice. We perceive no basis in our rules for concluding that those time limits and the requirement for filing a notice of appeal may be disregarded so long as an appeal brief is filed before the initial decision becomes final.

The Administrator next asks that, assuming a notice of appeal was required, we treat his appeal brief as a request that the Board take review of the matter on its own initiative. We will deny that request, for, as we recently had occasion to observe, in Administrator v. Wells, NTSB Order No. EA-3571 (served June 3, 1992), we will "not exercise our authority to review the unappealed decisions of law judges in order to rescue a party from the consequences of a procedural default." Moreover, as was the situation in Wells, the 20 day period within which the Board may take sua sponte action under its rules expired in this case before the Administrator filed his brief.³

²Section 826.38 of the Board's Rules Implementing the Equal Access to Justice Act of 1980 provides as follows:

"§826.38 Board review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Board may decide to review the decision on its own initiative, in accordance with Subpart H of Part 821 for FAA safety enforcement matters appealed under section 609 of the Federal Aviation Act. If neither the applicant nor agency counsel seeks review and the Board does not take review on its own initiative, the initial decision shall become a final decision of the Board 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Board. If review is taken, the Board will issue a final decision on the application or remand the application to the administrative law judge who issued the initial fee award determination for further proceedings."

³Section 821.43 of the Board's Rules of Practice provides:

"§821.43 Effect of law judge's initial decision, and filing an appeal therefrom.

If an appeal from the initial decision is not timely filed with the Board by either party, or the Board on its own initiative does not decide within 20 days after the issuance of the initial decision to review it, the initial decision shall

As it appears that the Administrator's failure to file a timely notice of appeal is not excusable for good cause shown, his appeal will be dismissed. See Administrator v. Hooper, NTSB Order EA-2781 (1988).

ACCORDINGLY, IT IS ORDERED THAT:

1. The applicant's motion to dismiss is granted,⁴ and
2. The Administrator's appeal is dismissed.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.

(..continued)
become final. However, the initial decision shall not be deemed to be a precedent binding on the Board. The timely review by the Board or the filing of such an appeal or motion shall stay the order in the initial decision."

⁴We also grant applicant's unopposed motion to amend his application to include his expenses in defending this appeal from the law judge's decision. However, our action in this connection implies no judgment as to the reasonableness of the expenses claimed, but simply reflects that the Administrator has not contested the additional amount sought.